BRIEF IN SUPPORT OF FOREGOING PETITION

The foregoing petition contains a summary statement of the case, of the question involved and of the reasons relied upon in this application for the writ of certiorari. The endeavor in this brief will be to develop the argument adequately without undue repetition of the matter contained in the petition in so far as practicable.

ARGUMENT

The opinion of the Circuit Court of Appeals completely *omits* any discussion of what is the *crux of the whole matter*, namely, the *bearing of the Fifth Amendment* of the United States Constitution *upon the statutory provision denying interest* on the amount of the Government valuation and deposit to be paid substantially at the time of taking to those entitled. It goes so far, as, in terms, *to limit* just compensation to the *"value of the property taken" itself*, thereby in *effect impliedly denying that just compensation would include full compensation for any delay in the full enjoyment of the monetary value of the land, and consequently* directly *conflicting* with the settled doctrine *of the many late cases of the Supreme Court* holding full compensation for such delay is an essential element of just compensation. In this way, i. e. by cutting such discussion out altogether, is avoided taking into account the period of restricted and conditional user only of the amount deposited until verdict, that would result from the theory of a possible diminution of an uncertain part of that amount by a subsequent verdict, and for which embarrassed period all interest, i. e. monetary compensation, is denied.

The Court cites two cases in neither of which was considered the question of compensation for delay in full enjoyment after the land was taken. In one Bauman vs. Ross, 167 U. S. 548, the question could not arise,

as the *statute* there provided that payment in advance was a condition precedent to taking possession of the land (p. 560), and therefore that the landowner could not be deprived of possession prior to the actual payment, so that the question of payment afterwards could not arise. The main point in it was whether special benefits could be credited against the just compensation.

The other case cited was United States vs. New River Collieries, 262 U. S. 341. The issue was whether market prices, or other bases instead, should be used to arrive at just compensation at the time and place of taking. Seventy-five per cent of the Government's estimate was paid immediately, and no question appears raised in the case as to compensation for any delay in the payment of the remaining twenty-five per cent. That the Court could not have meant to deny that full compensation for delayed payment after taking was a part of just ocmpensation is shown by its citing Sea Board Airline vs. United States 261 U. S. 299, which explicitly held that full compensation for delay must be paid, and both decisions were delivered by the same Justice and decided within three months of each other. And on this point the many cases hereinafter cited are explicit that full compensation for such delay is the settled doctrine of the Supreme Court.

If Miller vs. U. S., 129 Fed. 2d. 75 cited in the Court's opinion for comparison, has any bearing at all, it is, we submit inferentially contrary to such opinion, as it held a summary judgment for recapture of a portion of the deposit paid the owners constituted error.

The Court of Appeals' further statement as to the *Fifth Amendment*, that it "does not, as some State Constitutions do, direct that payment must be 'first' made in advance of the taking", is indubitally true, but it does not advance its argument. For said Amendment, by the settled construction of the Supreme Court makes the

payment to be *"due"* at the time of taking (Danforth vs. U. S. 308 U. S. 271, 283-4), and accordingly, if not paid *contemporaneously with the taking, requires damages to be paid for delay up to the time of ~~taking~~* payment, to-wit interest.

In the Court's interpretation of *the statute,* the same error is committed repeatedly, of *confining* just compensation to the *value of the property only,* and underlies its whole argument including the conclusion that the jury's verdicts fixed the *values of the property* at the time of taking and *to such alone were the landowners entitled.* Thus is *left wholly out of account* what, on this theory, would result, of *essential uncertainty of how much of the deposit* payable to the landowner *would belong to him until the verdict, with the consequent lack of complete ownership of any certain amount,* and inability to safely dispose of any part of it, and with only a restricted or embarrassed use pending the verdict and judgment, *whereby* the *element of full compensation* in damages, to-wit, interest, *for delay in full enjoyment required by the Fifth Amendment, is completely lost sight of* and would, in effect, *be nullified.*

Nor will the invocation of the statutory expression of "estimated" just compensation as applied to the deposit paid into court for the landowner, help the matter. For, being the official valuation by the government, it of course could not bind the landowner, and *as against him* it could only be an estimate, and was doubtless on this account so denominated, and would be subject to the landowners right, if dissatisfied, to have a judicial determination of whether he had cause for complaint or not. In any event, however, the mandate of the Fifth Amendment would control, so that, if such Amendment requires the amount of the Government's valuation deposited and payable to the landowner forthwith, because of all interest thereon being denied, to constitute just compensation pro tanto, and to be irreducible, because of the uncertainty and lack of abso-

lute ownership which would otherwise be produced, pendente lite, without adequate monetary compensation therefor, it must of necessity be so construed, and the issue, in effect, would be whether an amount additional thereto would be necessary to constitute just and full compensation. And being the Government's own official valuation provided to be paid immediately without security or regard to solvency, it could scarcely complain at being taken at its own word.

Before beginning an affirmative argument it might be here noted, but with fuller consideration later, that certain District Courts have taken the view for which petitioners contend, namely U. S. v. Certain Lands in Borough Brooklyn, 39 Fed. Sup. 91, applying the Fifth Amendment, Hessel v. Smith, 15 Fed. Sup. 953, 956, U. S. v. 266.25 acres in Charleston, 45 Fed. Sup. 633 hdn. 3 pages 635 (Government estopped); also see U. S. vs. Certain Lands (2 C.C.A.) 129 Fed. Sup. 577, 579.

Considering the matter affirmatively: first, the interpretation by this Court of the Fifth Amendment as applicable to the present matter, and, second, the interpretation of the statute in the light of the Fifth Amendment.

1. The Fifth Amendment of the United States Constitution as interpreted by the Supreme Court.

"The power of *eminent domain* . . . is an attribute of sovereignty, *limited and conditioned by the just compensation clause of the Fifth Amendment,*" Hanson Co. v. U. S. 261 U. S. 581, 587.

The *Fifth Amendment* to the United States Constitution provides "nor shall private property be taken for public use without *just compensation.*"

This Constitutional provision, as applied to eminent domain proceedings, has been thoroughly settled by the

Supreme Court to mean *"the full equivalent* of the value of the porperty at the time of taking *paid contemporaneously* with the taking," at *which time it is "due"*, and if *not* then paid, the owner *"is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking"*, of *which "interest at a proper rate, is a good measure", and must be allowed.*

In Monongahela Nav. Co. vs. United States, 148 U. S. 312, 326, the Court held:

> "The noun *'compensation'*, standing by itself, carries the idea of an *equivalent.* - - - - And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a *full and perfect equivalent for the property taken."* (Our emphasis here as in all quotations).

"Compensation" is derived from "compensare", "to weigh several things with one another". Webster's Dictionary Tit. "Compensation", "Compensate".

In *Brooks-Scanlon Corp. vs. United States, 265 U. S. 106, 123,* the Court held:

> "It is *settled by the decisions of this Court* that just compensation is the value of the property taken at the time of the taking. (Authorities) And, *if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added."* (Authorities).

In the late case of *Danforth vs. United States, 308 U. S. 271, 283-4,* in holding *interest must be allowed* from the date of taking, the Supreme Court held:

"Just compensation is value at the time of taking. - - - - *Compensation is due at the time of taking.*"

In *Jacobs vs. United States, 290 U. S. 13, 16,* the Court by Hughes, Ch. J., held:

"The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution. - - - It rested upon the Fifth Amendment. Statutory recognition was not necessary.* A promise to pay was implied because of the duty to pay imposed by the Amendment.

"The amount recoverable was *just compensation, not inadequate compensation.* The *concept of just compensation is comprehensive and includes all elements,* and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. The owner is *not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.' Interest at a proper rate 'is a good measure by which to ascertain the amount so to be added'* ".

The Court in the later case of *United States vs. Klamath, etc., 304 U. S. 119, 123, held interest must be allowed,* following the Jacobs case, and used this language:

"*The established* rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay *just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.*"

In *Phelps vs. United States, 274 U. S. 341, 344,* where the temporary use was taken, the Court held:

> "The Government's *obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken.* They are entitled to have the *full equivalent of the value* of such use *at the time of the taking paid contemporaneously with the taking.* As such payment has not been made, petitioner *is entitled to the additional amount claimed."* (Authorities). *And interest was allowed accordingly.*

In *United States vs. Rogers 257 Fed. (8 C. C. A.) 397, 399,* the allowance was of an amount equal to interest for the element of delay in the payment of compensation, and it was held:

> "The *duty and obligation to make just compensation* in such a case is *fundamental,* and *whatever is an essential element in that compensation cannot be excluded even by legislative enactment.* (Authority). "Just compensation rests on equitable principles, and it means substantially that the *owner should be put in as good position pecuniarily as he would have been if his property had not been taken."*

This case was affirmed in United States vs. Rogers, 255 U. S. 163.

And the just compensation must be paid in the only common or universal medium of exchange, or common denominator of all material values, in this country, namely, money. In *Olson vs. U. S. 292 U. S. 246, 254,* the Court held:

> The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a

matter of importance, for as said on Monongahela Nav. Co. vs. United States, 148 U. S. 312, 324, 'in any society the *fullness and sufficiency* of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326), that no private property shall be appropriated to public uses unless a *full and exact equivalent for it* be returned to the owner, *aptly expresses the Constitutional safeguard* against the uncompensated taking or use of private property for public purposes. (Authority). *That equivalent is the market value of the property at the time of the taking contemporaneously paid in money* - - He is entitled to be put in as good position pecuniarily as if his property had not been taken."

Similarly, in *C. B. & Q. R. R. Co. vs. United States, 16 Wall 667, 674,* it is said " 'just compensation' means pecuniary recompense to the person, whose property is taken, equivalent in value to the property."

That "just compensation" requires payment in money, is the thoroughly established law, and authorities need not be multiplied, but as further examples, it is recognized in the Monongahela, Brooks-Scanlon and Phelps cases, supra, which hold that the value is to be "*paid* contemporaneously with the taking." Upon the above judicially announced principle, that such payment must be *unconditional* so far as the condemnor is concerned, for example, without any condition for repayment or diminution in event of any possible future contingency, would seem a self evident and an inevitable corollary, but will be considered hereinafter.

In short, the mandate of the Fifth Amendment requires that just compensation, namely, the value of the property, be paid as of the date of the taking, *at which time it is due*, and if *not then paid, commands full com-*

pensation in money for all delay in the payment of such value, by way of damages, which are properly measured by *interest* from the time of taking to the date of payment. It may be assimulated to a private obligation, which if not *paid* when due, by law carries interest until paid.

2. The Declaration of Taking Act construed with the Fifth Amendment.

The Declaration of Taking Act was passed February 26, 1931, Chapter 307, 46 Statute 1421, et seq., codified U. S. Code Annotated, Title 40 Sec. 258a to 258e.

A fundamental rule of intrepretation is that "acts of Congress are to be construed and applied in *harmony with* and *not to thwart* the purpose of the *Constitution.*" *Phelps vs. U. S. 274 U. S. 340, 344.*

This statute, normally interpreted, seems intended to harmonize with the Fifth Amendment, and is not claimed to be unconstitutional by either side, and of necessity, must be controlled by this Amendment. There should be kept in mind its mandate for just and full compensation, not alone for the value of the property, but also for *damages, to-wit, interest, for any delay in the full enjoyment of such value.*

The Act provides for the filing of a petition by the United States for the acquisition of land for public use, accompanied by a Declaration of Taking by the properly empowered representative, here the Secretary of War, together with "a statement of the sum of money estimated by the acquiring authority to be just compensation for the land taken", and a deposit in court of such sum of "to the use of the persons entitled thereto", and provides that thereupon "title to said lands in fee simple absolute or such less estate or interest as is specified in said declaration shall vest in the United States," and be deemed "condemned and taken for the use of

the United States, and the right to just compensation for the same shall vest in the persons entitled thereto". U. S. C. A. Tit. 40 Sec. 258a.

The Act makes a parallel and correlative employment of the identical term *"use"* as to the rights of property of both parties—*"taken for the use of the United States"* as to the *land*, on the one hand, and "to the *use* of the *persons entitled thereto"* as to the *money deposited*, on the other hand, which seems significant and *manifestly to intend that the land or interest therein that is condemned, should be used by the United States beneficially to itself in any way it might see fit*, and *correlatively*, that the *money deposited should be used by the former landowner beneficially for himself in any way that he might deem fit*, and to indicate a parity or equivalency in the nature of the rights intended to be conferred, and as manifestly nothing short of ownership was intended for the United States, then similarly and correlatively, it would follow that nothing short of ownership was intended for the former landowner as to the money deposited. The term "use" like all other words, is to be interpreted with regard to the connection in which it is employed, and may indicate absolute use or complete ownership, instead of mere possessory or managerial use. Leggett vs. Perkins 2 N. Y. 397, 309, Lammars v. Chicago, 143 N. W. 1097, 1110, Ure v. Modern Woodman, 127 N. W. 665. Instances of its employment to signify absolute use or complete ownership are given in Words and Phrases Perm, Ed. tit. "Use" Page 474, citing 216 Pa. 575, 32 N. J. L. 233, 235, 34 Me. 394, 397; Page 477, citing 75 N. J. Eq. 351, and Page 464 cit. 139 S. E. 716, 718, Black's Law Dict. tit. "Use". Furthermore, the Fifth Amendment's requirement of just compensation as meaning that the landowner *must be put in as good a position pecuniarily as if his property had not been taken*, would *not* be complied with, if, in the place of the complete ownership of his rights in the land, he were only to receive as just compensation *in*complete ownership of the money deposited, without

power of safe disposition and only an embarrassed power of user, subject to ultimate possible diminution in an uncertain amount by a subsequent verdict.

Similarly the Act provides, correlatively, for the *vesting* of the respective property rights by saying, that, upon the filing of the declaration of taking, and the *deposit* in Court of the said money, that "*title* to the said lands in fee simple - - - *shall vest* in the United States of America", and said lands "shall be deemed to be *condemned and taken* for the use of the United States," showing definitely that *ownership* of land, was intended as to the United States, and, as a parallel and on a parity, that "the *right to just compensation* for the same *shall vest* in the persons entitled thereto", so that the *identical* expression "*shall vest*" is applied *both* to the United States and the former landowner, thereby indicating an intention to make *equivalent the nature of the rights of each,* and the term "vest" has, of course, a well defined meaning "to give a *fixed and indefeasible right*". Black Law Dict. "Vest". As to the United States the title was obviously to vest in praesenti, and as to the landowner, similarly, his right to just compensation would also vest in praesenti and would naturally be intended to attach to such part and all of the just compensation as it came into being, and, though the former landowner might not accept the government's valuation or deposit as total compensation, and there might be an additional amount ultimately allowed in the proceedings, still that the *amount of such deposit was intended to be, in any event, part of the just compensation, that is just compensation pro tanto, with the right and title thereto intended to vest in him, appears to be the natural and ordinary construction.*

Keeping in mind the Fifth Amendment's mandate of full compensation for any delay in the payment of the land's value due at the taking, a proper measure of which is interest (like as in the delayed payment of a private obligation), the provisions of the Act as to in-

terest are pursuasive and conclusive. It enacts that "said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and said judgment shall include as part of the just compensation awarded, interest at the rate of 6% per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; *but interest shall not be allowed on so much thereof as shall have been paid into the Court*", and that, "upon application of the parties in interest, the court may order *that the money deposited* in the *Court or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceedings.*" These provisions manifestly were intended to accord with the Fifth Amendment. The allowance of interest on any possible additional amount, was obviously intended to provide compensation for the delay in obtaining such additional amount as might be awarded by final judgment, and there being the express prohibition of any interest on the amount deposited and its being payable forthwith to those entitled, indicates that it was intended as a cash payment, in effect, contemporaneous with the taking and without delay, to be treated *as a part of the just compensation or just compensation pro tanto, with all of the attributes of just compensation, namely, of immediate, actual and full beneficial use and complete ownership*—in short, *of money to be treated as money.* This construction would also be necessary under the Fifth Amendment requiring just compensation, to-wit, interest, for any delay in the payment of just compensation, and as such deposit cannot both be and not be "just compensation", it must be just compensation, properly speaking, with all of its attributes. Again, providing interest on any additional amount ultimately awarded, being obviously in order to allow just compensation for such delay, considered in connection with the denial of interest on the amount deposited which was contemplated to be paid out "forthwith", indicates the intention to place the *principal sums, i. e. the amount deposited and also the additional*

amount, on the same basis, as of the time of taking, each of which would naturally have the same essential nature and attributes, i. e. each constitute "just compensation" pro tanto, and to be treated and used alike, viz. as money paid unconditionally and owned absolutely.

It seems obvious too that such amounts *taken together*—the cash amount without, and the deferred amount with, interest—were intended to be *equivalent compensation* as of the *date of taking,* and to *put the condemnee in the same condition pecuniarily* as he was immediately before such taking. In order for him to be in this same condition, too, it would manifestly be necessary for the amount deposited to vest in him immediately, with rights of the same nature and extent as those he had in his property before taking, to-wit, those of genuine ownership.

Again, if the amount paid was not an absolute and unconditional payment of money, qua money, and it could only be used in a restricted and embarrassed way and subject to defeasance in uncertain part by possible condition subsequent, it is submitted, it could not constitutionally be regarded as just compensation, properly speaking, in whole or in part; but if the payment be made absolutely and unconditionally so that the money would become the absolute property of the landowner, contemporaneously with the taking, and interest be given on the additional sum, if any, allowed for the land's value at taking, then there would be a compliance with same Amendment, and consequently the Act must be so construed in order to be constitutional.

That the Act intends the money deposited to be paid as just compensation pro tanto and thereby harmonize with said Amendment, is further indicated by the provision of its payment "forthwith" "*for or on account* of the *just compensation*" to be awarded in said proceedings. As "for" would naturally mean in *full payment* for, and "on account of" would mean in *part pay-*

ment of, the just compensation as such, the terms are adjusted to apply both to where the deposit might be accepted in full payment for the just compensation, and also to where it might be accepted as only in part payment of such just compensation.

Nor is said construction affected by the provision that "the court may order such payment", as in view of the requirement of the *Fifth Amendment, it is necessary to the constitutionality of the Act,* and the Act's intention is otherwise plain, that the parties entitled must be paid the amount deposited as at least part of the just compensation, and consequently the matter could not be left to the option of the court, and it is its duty so to act, subject to necessary judicial determination of the validity, nature and extent of the rights involved.

Nor is such construction affected by the amount of the deposit being the sum "estimated" by the acquiring authority to be just compensation for the land taken. For, in any event, the *mandate of the Fifth Amendment must control,* and it necessitates that such deposit must be paid as just compensation pro tanto. But in addition, that it was not a casual estimate, but the government's own official valuation upon which it is willing to fully rely, is shown by the provision that it should be paid out forthwith, regardless of solvency vel non, and with the additional check in Sec. 3 that the chief of the Government agency empowered to acquire the land, must also pass an opinion that the ultimate award probably would be within any limit prescribed by congress on the price to be paid, and of necessity such chief authority could not faithfully discharge this duty (and every officer is presumed to do his duty, U. S. vs. Chem Foundd 272 U. S. 1, 14-15, 227 U. S. at 535, Mechem "Pub. Off. Sec. 579), without determining what, in his opinion, would be the reasonable market value from the Government's standpoint as purchaser. In short, altogether, the statute manifestly imposed a duty upon the Government officials to make a careful and reliable valuation

of the property, though as against the condemnee it would only be properly an estimate by the condemnor and not binding on such condemnee. The government can only act through authorized agents, and its being bound thereby would constitute no unfairness or injustice to the principal, otherwise, too, it could never act nor could anyone deal with it. If the United States be incompetent to determine for itself, by its accredited agents, what is the reasonable market value of land, at which it is willing to buy, it would logically follow that it is incompetent to protect itself. In United States vs. 266.25 acres in Charleston, S. C., 45 F. Suppl. 633, hdn. 3, page 635, the court's opinion was that;

> "the *sum of money deposited* is what the *Government*, which is taking the property, *itself determined* to be *'just compensation'*. It would seem that the Government by such proceeding *is estopped* from claiming that the property is *worth less* than that stated in its Declaration."

In Danforth vs. United States, 308 U. S. 271, the statute provided that where the proposed price of land "in the opinion of the Secretary is reasonable, he may purchase the same at such price" (p. 278), and an agreement of purchase was made accordingly, and upon an attempted repudiation by the Government, the Supreme Court held it bound. In New England, cases involving similar statutes authorizing the taking of land upon its initial valuation by public officials, subject to appeal, hold the public bound by what is in substance its own action and valuation. *Selectmen vs. Alpha Mills Co. 81 Atl. (Conn.) 1051, Marshall Co. vs. Hadley Co. 5 Cushing 602, 604, Worcester vs. County Commrs. 100 Mass. 103, 105, Low vs. Concord R. R. Co. 3 Atl. (N. H.) 739, 741; also Houser vs. Olmstead 230 N. W. 224, Board vs. Forrest 137 S. E. 431, Grand Rapids vs. Bogoger 124 N. W. 659.*

The Act has another provision, that "just compen-

sation shall be ascertained and awarded in said proceeding and established by judgment therein", thereby providing for judicial ascertainment and award, if desired, as the landowner could not be bound by the ex parte valuation of the government, but it does *not provide for judgment against the United States,* for the *full amount* of the award. *Nor* does it say that if the compensation finally awarded fails to exceed the amount of the deposit, that there would be any *judgment at all against the United States,* and, impliedly, *in such case* there would *not* be *a judgment against the United States,* merely, a judicial ascertainment of value, and *only* if an *additional* amount be finally awarded, is there to be a judgment against the United States, and *only* for such *additional amount* above the deposit, and *not* for the amount deposited. This is note-worthy, and the inference is obvious that the amount of money deposited to be paid to the persons entitled, is intended and treated as belonging absolutely to such persons as just compensation, or just compensation pro tanto, and under the Fifth Amendment necessarily so, with all of the qualities and attributes of just compensation, properly speaking, and it having theretofore *vested* in the persons entitled, *no judgment against the United States* would be necessary or proper.

Another striking feature of this provision. While treating the subject of a *possible difference* between the award and the Government's valuation and providing for the payment of any excess amount to the owner, it *omits altogether to provide for repayment by the owner in case the award be below the government valuation.* Surely had it been intended to provide for any possible difference of the latter kind, including repayment, it would have been so expressly provided. This omission upon the familiar principle of expressio unius exclusio alterius, would indicate an *intention not to make such a provision,* and in view of other provisions of the Act—those entitled to be paid the full amount of the Government's estimated valuation on account of just compen-

sation regardless of financial responsibility, or irresponsibility, without security for its return, and the probability in most instances that any money paid out could never be recaptured, and the practical futility of expecting repayment (142 So. Rep. at 218) in case of an award less than the Government's valuation, and the vesting of the right to the full amount of just compensation as finally awarded to those entitled, that it was intended to be taken and used immediately by such persons, and that interest was denied upon such deposit—in view of all these provisions, and no requirement whatever being made as to repayment, it would seem patent that this omission was intentional, and that it was purposed that the Government be taken at its own word as to value, and be bound by its own official valuation, and that the only disputable issue, in effect, would be as to whether any additional sum was to be awarded or not. Incidentally, the trial court could limit the issue by charge and without assigning a reason, 64 C. J. Tit. "Trial" p. 297, and without connecting the Government with the minimum; or, if need be, by judgment non obstante veredicto. But when, in addition to the statute, one considers the Fifth Amendment's requirement of full compensation, properly speaking, with its implication of full compensation, properly speaking, with its implications inhibiting uncertainty of amount, and only limited and embarrassed use, pendente lite, it becomes clear that Congress could not constitutionally intend (as it did not intend) to provide for any such repayment or reduction, and intended the full amount of the deposit to belong absolutely to those entitled, and that just compensation should mean full compensation.

The Act, especially in the light of the Fifth Amendment, showing the intention to be that the full amount of the deposit was to be paid to, and be used as the absolute property of, those entitled, would mean of course unconditional payment and ownership. And if a repayment, or recapture, clause were inserted by construction (so-called), namely, that if a given contingency

should arise, to-wit, if a jury's verdict should be lower than the Government's valuation, then a part of the money should be repaid, *this would constitute essentially a condition, and to imply* such a condition, would be *in effect to make the unconditional provisions of the statute actually conditional,* and therefore, despite the fact that the Statute, as expressed, made the money the absolute property of the landowner, would, *by implication or supposition, make it not the absolute property of the landowner.* Assuredly this cannot be done, as, if permitted, it would be, in effect, by so-called judicial construction, to *actually create, and legislate into the statute, something that was not in there,* and, indeed, would be really *contrary to what is expressly provided in such statute.* Courts *"are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction." United States vs. Mo. Pac. R. Co. 278, U. S. 269, 277-8; see Union Cent. L. I. Co. vs. Champlin 116 Fed. 860, Brun vs. Mann 151 Fed. 145, 157, Omaha W. Co. vs. City, 147 Fed. 1, 13, Wabash R. Co. vs. U. S. 178 Fed., 5, U. S. vs. Mo. P. Mill Co. 213 Fed. 169, 173, 59, C. J. 974.* And *in Russian Vol. Fleet vs. U. S. 282 U. S. 481, 492,* the Court said that, where a right to compensation existed at the time of taking, it could not be defeated by a subsequent occurrence, as *"the Act - - - if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the Act." A fortori where the condition sought to be implied would actually make the Act unconstitutional.* In the case at bar, as in the Russian case, it would be, in substance and effect, to *create by implication a condition subsequent to divest a theretofore vested unconditional right.* See also *Mo. Pac. R. R. vs. Boone 270 U. S. 466, 471-2.*

If, however, the lower Court's rulings be assumed to be correct, so that the amount of the Government's valuation and deposit for those entitled could be re-

duced to conform with a subsequent verdict in a lower amount, what would result?

The Act expressly provides that the full amount of the Government valuation and deposit is to be paid to those entitled, "for or on account of just compensation". "Just Compensation", meaning "full compensation", manifestly would not signify simply a given amount of money per se, because the value of money lies in what it can be used for. If it could not be used, then its mere receipt with only the power to hold or hoard it, would profit one nothing, and, it had better remain in the Registry of the Court, with no responsibility for its possible loss. Obviously that could not constitute just compensation.

If the lower Court's construction be correct, so that in case of a verdict below the Government's valuation, the owner should be called upon the return the difference, what would be the amount of such difference? That could only be learned after the return of the verdict, not before. Therefore, such *possible amount, until the verdict,* would be *essentially uncertain.* The difference might be $1,500.00, as in Mrs. Willis' case, or $4,500.00, one third of the whole, as in the Garrows' case. Take the Garrows. The Government valuation and the amount deposited and payable to them was, say, $13,000.00, and the Jury's verdict, say, $8,500.00. If they did *not take* the $13,000.00, as the statute denies them all interest on the amount deposited, they *would lose all interest* on this $13,000.00. If, however, they *did take* the $13,000.00, what would be their situation? Of course, on the receipt of the $13,000.00, they *could not then know that the jury would bring in a verdict for only $8,500.00.* (1) Suppose, however, the jury should actually bring in a *verdict for $13,000.00* or more, and the Garrows out of caution *had not invested or put the $13,000.00 to work financially, they would lose all earnings on what they may have failed to invest.* (2) On the other hand, *if* the jury's *verdict* should be for *less than*

$13,000.00, and the Garrows *had put to work the whole $13,000.00, say, by investments in stocks and bonds, such stocks or bonds might depreciate in value or even become worthless,* and in consequence, to the *extent of such depreciation,* the Garrows *could not respond from the funds received by them,* but if honest, they would want to pay a legal obligation (if it were legal), and would either be embarrassed and mortified by being unable to pay the deficiency from said fund, or have to make it up from other assets, which it would not be fair to call into play, as each fund for each parcel of property should be considered by itself and independent of other funds. In this case the Garrows actually received, without prejudice, the *$13,000.00,* before the verdict, and the Court's judgment ordered a credit of $4,500, being the difference between said $13,000 and the jury's verdict, be allowed the United States, thereby in effect, deducting $4,500 from said Government valuation and deposit of $13,000, so the case is not altogether hypothetical. (3) Now, if the verdict were for $13,000.00 or more, and the whole $13,000 had been invested, great embarrassment nevertheless must necessarily have accompanied such investment, as the possibility of having to repay an *uncertain* amount would make the *sum* available for investment *uncertain,* and as the *time* for the return of it would also be *uncertain,* depending upon the time when final judgment might be rendered, it would be practically impossible to invest the whole or any certain amount in any normal or really advantageous manner, so that there would not be even the normal, or reasonably practical, investment use of it. Also, to make such investments, even if successful, under such awkward and difficult circumstances, would necessitate the expenditure of an unusual amount of time, energy, mental effort and worry, in deciding upon any investment, and this would also be true of all attempts to invest. (4) The only other possibilities would be in case the verdict was under $13,000, and, either (a) where more of the amount received was used than the amount of the verdict with a return of the difference required, which

would be substantially the same as in possibility numbered (2) above, or (b) where the investment was less than the verdict with consequent loss of earnings on the difference, which is substantially the same as in possibility numbered (1) above given. Furthermore, in all instances above given, numbered from (1) to (4), under the lower Courts' construction, logically, they could *not dispose absolutely* of *any part of the money, whether for payment of debts, for purchase of property, or for any other purpose whatsoever,* as *thereby they would be deprived of just that much of the fund to be returned in case of a verdict below the amount received.*

Could payment under such circumstances and involving inevitably such an embarrassed situation, be properly characterized as *"just compensation"* or *"full compensation"?* Does not "full compensation" mean, not simply a given amount of money in itself, but, a sum of money accompanied by the full, free and absolute power of user and disposition, without having to account to anyone therefor, and without a potential or contingent obligation to repay any part thereof, or its equivalent, to anyone, and without being compelled to make *worse than even a gambler's choice, as, in any event, there must be either financial loss or great embarrassment, accompanied in every case by the entire lack of the power of absolute disposition. Could anything be conceived of, as being more essentially an utter mockery of just or full compensation, than a situation such as that?*

Again, on the lower Court's construction, as an uncertain and possibly a large part, would be subject to being repaid, the former landowner would become, in effect, a *borrower,* with only a restricted power of limited use, without power of absolute disposition, or even of normal investment of a definite sum for a definite period, and it cannot be reasonably contended that such a situation is equivalent to that of an absolute owner, and yet the lower Courts'

interpretation delays absolute ownership until verdict and final judgment in the cause, while the Act expressly denies interest on the sum deposited, so that none can be allowed during the whole period pending suit and before final judgment, i. e. *without financial compensation for such mere restricted or limited user despite the Fifth Amendment requires full compensation, namely, absolute ownership, and not inadequate compensation as of a borrower only, and, in case of any delay, full compensation, to-wit, interest for the period of such delay. It is submitted, such an interpretation cannot be correct.*

Nor can it be correctly said, that, like as interest on a delayed payment represents compensation for the inability to use the money during such delay, being a just measure of damages for such delay, so the statute grants the qualified and limited use, as of a borrower, of the money deposited, during that interval, and therefore such use, though much restricted, is a substitute for, and the equivalent of, interest, as a measure of damages for the delayed absolute ownership of such money, *because such qualified, limited and conditional use of money, is not money itself, intrinsically and absolutely considered, and yet money as such, and only money, and nothing short of or different from money, will satisfy the mandate of the Fifth Amendment.* Olsen vs. U. S. 292 U. S. 246, 254, Brooks-Scanlon Corp. vs. U. S. 265 U. S. 106, 123, Phelps vs. U. S. 274 U. S. 341, 344, 2 Lewis "Eminent Domain", sections 682, 756, 1 Nichols "Eminent Domain", sec. 205, Van Horne vs. Dorrance, 2 Dallas (U. S.) 304, at 315. On this theory just and full compensation *of the character required by the said Amendment,* for the *interim* pending suit, would not be provided for, and the *Circuit Court of Appeals' construction cannot be correct,* and, in order for the statute to be constitutional, the amount of said deposit must be regarded as an absolute and unconditional payment of money, at the date of the taking, when it was "due", "for or on account of", and as an integral part of the

just compensation intended for the former landowner.

Again, on the lower Courts' construction, how much of the deposit would belong absolutely to the condemnee must be uncertain, and therefore unknown, until verdict and judgment, and how much of the amount of just compensation would be represented thereby must also be uncertain and unknown till then. But just compensation is due at the taking, and how could payment be then made of just compensation in an unknown amount? The condemnee would not know how much he was receiving as just compensation and as belonging to him, or how much of the amount received he could use as his very own. Payment in an unknown amount, and payment of just compensation, are strictly and properly speaking incommensurate.

In short, the nature and effect of the consequences above considered at length which would flow from the construction of the Circuit Court of Appeals, if it were assumed to be correct, demonstrates palpably and inevitably that such construction cannot be correct, and is fundamentally in conflict with the settled interpretation of the Fifth Amendment as determined by the repeated and late decisions of this Court hereinbefore quoted. How could the amount of the deposit paid to the condemnee be just or full compensation, in whole or in part, if there were not full and free use and disposition of it, or at least a definite part of it, allowed, which in the nature of things, could not be true *if an uncertain and indefinite part of it were potentially subject to be repaid in the event of a subsequent contingency,* to-wit a jury's verdict below the Government's valuation, *with the attendant uncertainty, worry and hazard, accompanied by serious and unfair embarrassment? The full, free and untrammeled right,* to use and dispose of it and every part of it as *owner,* is *essential* in *the nature of things to just or full compensation,* properly speaking, and *to compliance with the "just compensation" made imperative by the Fifth Amendment.*

Substantially this principal is recognized in *Mayor Jersey City vs. Haimlton, 56 Atl (N. J.) 670, 672,* construing the State Constitution as to "compensation", where the compensation had been paid into court and received by the landowner, where the court held that *"compensation means that the money" (paid as compensation) "shall become theirs (owners) absolutely and that they shall have the same dominion over it that they had over the land before it was taken, and nothing short of this will satisfy the constitutional requirement, hence the conclusion naturally follows that the right to the money paid to the landowner is intended to be as absolute and indefeasible as the right of the corporation to the possession of the land."* Similarly in the case at bar the *embarrassed use of the money deposited,* on the lower Courts' construction, could *not* mean the just and full compensation required by the Fifth Amendment, and *interest being prohibited by the Act, then only unconditional use and ownership would comply with said Fifth Amendment—no interest, no delay in absolute ownership.*

An analysis of the right of property, its nature and essential attributes, is convincing in this connection.

"The concept of just compensation is comprehensive and *includes all elements"* (Jacobs vs. U. S. 290 U. S. 13, 16), and "whatever is *an essential element* in the compensation can not be excluded even by legislative enactment" (U. S. vs. Rogers 257 Fed. (8 C. C. A.) 397, aff. 255 U. S. 163); and the principle is parallel to the one requiring that *"all elements"* giving value to the land condemned must be taken into account (Patterson case 93 U. S. 303, 308); consequently *"all elements" giving value to just compensation must be taken into account in determining what is just compensation itself.*

As to the essential attributes of property, "American Juris prudence" Vol. II Tit. "Constitutional Law" p. 1146, says

> "the right of property is very broad and *embraces* practically *all incidents which property may manifest.* Within this right are included the right to acquire, hold, enjoy, possess, use, manage, insure and improve property. A *very important incident* of the right of property is the *right to dispose of it.* Thus, the right to buy, sell, barter and *exchange property is a necessary incident* to its ownership, and, subject to reasonable regulation, is *as much protected by the Constitution as is the ownership itself".*

As showing what is "property" within constitutional protection, the construction of the parallel provision as to due process, is that a denial thereof results from "any statute, whether State or Federal, which *takes away any of the essential attributes of private property,* or imposes *unreasonable restrictions on its use and enjoyment, or which seriously impairs or destroys the value of the property or its use".* 16 Corp. Jur. Sec. Tit. "Constitutional Law" p. 1205.

Considering, the essentials of property rights, generally, *Schouler "Pers. Property",* 3rd ed. Vol. II, Sects. 2 and 3, says:

> "Title is the true foundation of ownership; and the *right of ownership may be defined as that by which a thing belongs to one person, or set of persons, to the exclusion of all others,* - - - It is *only* where possession, the right of possession, *and the right of property, meet in one and the same* person, that *title to the particular chattel stands complete."*

But according to the rulings of the lower Courts in this case, the condemnee would not "hold, enjoy, possess, use and manage" the amount of the deposit prior to verdict, except in a *limited and embarrassed* way, and *without the right to absolutely dispose of any part of it,* as it would be subject to possible reduction in un-

certain part by a subsequent verdict and judgment, consequently, *until then the condemnee would be deprived of certain attributes of property in said amount.* Furthermore, until then, there would be no definite, certain or known amount that would belong absolutely to the condemnee, and therefore, until then, no certain or known amount that could possess all of the essential attributes of property, and uncertainty as to the whole or any part, would make the whole deposit, and every part of it, lacking in certain essential attributes of property. As a result therefore, no part of the amount deposited could constitute just or full compensation, pendente lite, and only *unconditional* payment of the whole amount of such deposit, could possibly comply with the mandate of the Fifth Amendment. On the Government's theory, indeed, before verdict there would only be a sort of *denatured* compensation.

Palpably there cannot be any reduction in the full measure of just compensation made imperative by the Fifth Amendment. In Spring Val. Wat. Works vs. San Francisco 124 Fed. 574, 602, the Court held:

> *"Neither is it in the power of the Court of diminish the measurement of just compensation in any degree. - - -*
>
> "As said by Mr. Guthrie, in his lectures on the Fourteenth Amendment" (in this respect like the Fifth Amendment) *"to the Constitution of the United States,* in construing or expounding a constitution, the ancient maxim, *'De minimis non curat lex', has no application. The violation of a constitutional right should never be measured, or met by any such plea."*

Support for petitioners' fundamental position is found in the following authorities.

In *U. S. vs. Certain Lands in Borough Brooklyn, 39*

Fed. Sup. p. 91, the land owner applied for payment of the money deposited, but the Government insisted "a sufficient sum" thereof should remain in the registry "as security to cover contingencies," the Court held:

> "Section 258a - - provides for interest only on the excess over the amount deposited. The Congress could not deprive an owner of its property *without just compensation. It was the intention of the Congress to provide that the amount deposited should be immediately paid in full tothe person entitled to receive the same, otherwise it would violate the Fifth Amendment to the Constitution of the United States.* (pp 94-95).

In *Hessel vs. Smith 15 Fed. Sup. 953, 956,* it was held, "Provision is made - - for *the amount estimated by the acquiring authority as just compensation to be paid into court and made immediately available to those entitled to it.* - - Likewise, provision has been made for payment to those entitled of any additional amount awarded in the condemnation proceeding with interest thereon from the date of 'taking' at the rate of 6 per cent per annum. *Thus it is only such additional amount, if any,* that may be awarded in the condemnation proceeding, of which *the plaintiff and any others entitled thereto are deprived pending the conclusion of the proceedings,* and provision is made for payment of the interest on such additional amount which is equivalent, as near as may be, to payment for the use of premises *in so far as not paid for by the deposit in Court."*

In *U. S. vs. Certain Lands 129 Fed. 2nd. (2 C. C. A.) 577,* in considering the nature of the amount deposited, both the lower and the appellate Court seem to have assumed that the amount of the deposit vested in the condemnee as owner, subject to liens, etc., and the Court (p. 579) states that "counsel for the United States" in

their argument assumes that "this amount" (there the mortgagee's claim) "*was immediately and unconditionally available to the appellant* (mortgagee), it was in practical effect a tender which should stop the accrual of interest".

In U. S. vs. 266.25 acres 45 Fed. Sup. 633 hdn. 3 p. 635, heretofore cited, the opinion of the Court was "*The sum of money deposited is what the Government - - - itself determined to be just compensation.* It would seem that the Government by such proceeding is *estopped* from claiming that the property is worth less than that stated in its Declaration."

It would be surplusage to repeat the detailed consideration of the opinion of the Circuit Court of Appeals already given in the Petition for Certiorari presented herewith, reference to which is here respectfully made.

In brief, to allow the decision of the Circuit Court of Appeals to stand, would be to sanction, or at least permit, a misinterpretation of the important Declaration of Taking Act, that would make a gratuitous and unwarranted interpolation in said Act of a condition in contradiction of its language and intent, and to the destruction of vested rights of property, and which, in effect, would nullify the Fifth Amendment's guarantee of just and full compensation for delay in the full enjoyment of the value of the land taken under said Act, contrary to the settled construction of said Amendment by this Supreme Court.

It seems scarcely necessary to add that where separate parcels belonging to the same owner are separately valued, as here (as is usual 29 C. J. S. p. 1280, 20 C. J. p. 928, 216 Alabama 671 hdn. 2), that the owner has a vested right to the full valuation of each parcel, and that the values of all the parcels cannot be treated as joint, so that the owner could still complain if one parcel

were valued by the jury at less than the Government's valuation of it, though the aggregate values of all of his parcels by the jury might exceed the aggregate values of all such parcels by the Government.

In view of the facts being of record and to abbreviate unnecessary procedure, it is submitted whether the Court may not only reverse the judgment of the Circuit Court of Appeals affirming the judgments and orders of the District Court, and itself render judgment establishing the amount of the just compensation due the parties to this petition, similarly to what would have been proper had the motions for judgments notwithstanding the verdicts been granted, and at the same amounts for the said parcels, respectively, as constituted the Government valuations, and which were deposited in the registry of the District Court, with such further orders as might be proper to make such judgments effectual.

Respectfully submitted,

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